IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT

JODHPUR.

JUDGMENT.

Govind Prasad & ors. vs. Vijay Singh & ors.

S.B. Civil Second Appeal No.224/2002 against the judgment and decree dated 7.8.2002 passed by the learned Addl. District Judge, Rajgarh(Churu) in Civil Appeal No.14/98.

Date of Judgment: June 01, 2006.

PRESENT

HON'BLE MR. PRAKASH TATIA,J.

Mr. Om Mehta, for the appellants.
Mr. M.C. Bhoot,for the respondents.

REPORTABLE

BY THE COURT:

This appeal by the defendant tenant, is against the judgment and decree passed by the first appellate court dated 7.8.2002 by which the first appellate court reversed the judgment and decree of the trial court dated 5.5.1998,

Brief facts of the case are that the appellant-defendant's ancestor Bashesar Lal was tenant in the suit shop. The tenancy was annual. The plaintiff-Jaichand Lal-landlord filed the suit for eviction of said tenant Bashesar Lal on various grounds, like default in payment rent, sub-

letting, material alteration and causing damages to the property by the tenant. Original tenant Bashesar Lal died on 9.10.1986, therefore, said Bashesar Lal's heirs were impleaded as party defendants in the suit. After trial, the suit of the plaintiff was dismissed by the trial court by judgment and decree dated 5.5.1998, against which regular first appeal was preferred by the plaintiff-landlord. The first appellate court decreed the suit of the plaintiff on the ground of sub-letting and material alteration. Hence this second appeal. Before this, the matter came up before this Court in second appeal, the plaintiff and defendant nos.3 and 4 died and their legal representatives were taken on record.

According to the learned counsel for the appellant the basic facts which are required to be pleaded to prove the case of sub-letting, have not been pleaded by the plaintiff in his plaint and this Court as well as Hon'ble the Apex Court in number of cases held that the pleading must be clear and must convey its meaning to defendant so that the defendant may contest the suit and for that purpose, he must know what are the allegations against him. It is also submitted that even sub-clause (e) of sub-section (1) of Section of the Rajasthan Premises (Control of Rent and Eviction) Act, 1950 (for short 'the Act of 1950') itself provides that the landlord can seek eviction of his tenant only in case when the suit property is sub-let by the tenant “without the permission of the landlord.” The learned counsel for the appellant

heavily relied upon the provisions of Section 108(B)(j) of the Transfer of Property Act,1882 and submitted that sub-letting is permissible under law and because of sub-clause (e) of sub-section (1) of Section 13 of the Act of 1950 only, the landlord's permission is required for sub-letting of the rented premises. Sub-clause (j) of Clause (B) of Section 108 of the Transfer of Property Act specifically gives right to lessee to sub-lease the whole or any part of his interest in the leased property. Therefore, unless the fact constituting cause of action that the suit premises has been let out “without permission of the landlord”, the suit is liable to be dismissed for non-disclosure of cause of action. The learned counsel for the appellant in support of need of strict pleading, relied upon the judgment of the Hon'ble Supreme Court delivered in the case of Duggi Veera Venkata Gopala Satyanarayana v. Sakala Veera Raghavaiah and anr.(1987(1) RCR 186(SC)) and earlier judgment of this Court delivered in the case of Phool Chand & another v. Dr. Gulab Chand (1999(3) WLC 189) wherein the landlord did not plead about “non-tendering of rent to the landlord” and the court held that the suit is not maintainable for want of proper pleading for maintaining the suit for eviction of the tenant on the ground of default. The learned counsel for the appellant also relied upon the judgment of the Hon'ble Apex Court delivered in the case of Udhav Singh v. Madhav Rao Scindia (AIR 1976 SC 744) wherein Hon'ble the Apex Court held that all material facts are required to be

pleaded and if necessary facts are not pleaded, the suit can be dismissed on this ground alone and the same view was taken in the judgment of the Hon'ble Apex Court delivered in the case of Harkirat Singh v. Amarinder Singh(2006 AIR SCW page 4. In the same sequence, the learned counsel for the appellant relied upon one more earlier judgment of the Hon'ble Apex Court reported in the case of Hasmat Rai and another v. Raghunath Prasad (AIR 1981 SC 1711).

Next it was contented that when there was no pleading constituting cause of action, no evidence in support of the plea of sub-letting could have been considered by the courts below. It is also submitted that the documentary evidence produced by the plaintiff in the form of photographs (Exs.35, 36, 37 and 38) were wrongly relied upon by the courts below. Not only this but the said evidence, on the face of it, is unreliable and is not of the suit property. The timing on which the photographs were taken makes it clear that these documents are result of trick photography only. It is also submitted that even the plaintiff's own and his witnesses' evidence itself fully proved that these photographs are not of the property in dispute and these photographs were not taken at the time as projected by the plaintiffs. The learned counsel for the appellant submitted that even the plaintiffs' evidence in relation to the photographs (Exs.37 and 38) are that they were taken at the same time whereas Ex.37 is coloured photograph and Ex.38 is black

and white photographs. There cannot be two photographs from one camera, one coloured photograph and another black and white photograph. Even if there were two separate cameras then there is no evidence of the plaintiffs that the photographs were taken by two different cameras. It is also submitted that Ex.36 is a photograph of one very small piece of wall and this photograph clearly shows that the plaintiffs produced the photograph deliberately suppressing material facts in the photograph so that he can use the photograph of any other property.

It is also submitted that the defendant was not confronted with these photographs when defendant gave his statement in the trial court. The defendant in his statement clearly stated that he never sub-let the suit property. The courts below relied upon, particularly the first appellate court relied upon Ex.38 where the board of Hind Tailor has been shown which according to the plaintiffs was of the sub-lettee whereas this photograph is also not of the property in dispute. The evidence which has not been brought to the knowledge and notice of the defendant and the documents which have not been confronted, cannot be used against the defendant. For this the learned counsel for the appellant relied upon the judgment of the Calcutta High Court delivered in the case of A.E.G. Carapiet vs. A.Y. Derderian (AIR 1961 Cal. 359) and the judgment of the Hon'ble Apex Court delivered in the

case Rajinder Prashad(dead) by L.Rs. vs.Smt. Darshana Devi (AIR 2001 SCW 3042) and Sarwan Singh vs. State of Punjab (2002 AIR SCW 4295).

Next it was also contended that for sub-letting it is required to be proved that the tenant in chief has parted with possession of whole of the leased property or the part of the leased property and gave exclusive possession to the sub-tenant with a right to the sub-lettee to exclude the tenant in chief. Without this exclusive possession of the third person, there cannot be sub-tenancy and the sub-letting by the tenant in chief. The learned counsel for the appellants relied upon the judgments of the Hon'ble Apex Court delivered in the case of Dev Kumar (Died) through LRs. vs. Smt. Swaran Lata and others (AIR 1996 SC 510) and Resham Singh v. Raghbir Singh and another (AIR 1999 SCW 3029).

The learned counsel for the appellants in addition to above relied upon the judgments of this court delivered in the cases of State of Rajasthan v. M/s. Bundi Electric Supply Co. Ltd.(AIR 1970 Raj. 36), Girdhar Singh and another v. Anand Singh and others(AIR 1982 Raj.229) and Smt. Bhani v. Mahaveer Prasad (1997 DNJ (Raj.) 151) and the judgments delivered in the cases of Milkiat Singh & anr. vs. Jogindrer Singh & ors. (1998 DNJ SC 47) and Durga Prasad v. Mst. Praveen & ors. (AIR 1975 MP 196).

The learned counsel for the appellants further submitted that the finding of the first appellate court on issue of material alteration is

contrary to settled law because of the simple reason that firstly there is no evidence that the plaintiffs materially altered the suit premises in any manner, secondly because of the reason that even if it is held that the defendant altered the suit premises as alleged by the plaintiff even then it has not diminished the value of the suit property and thirdly the alleged act is of such nature which do not constitute material alteration.

The learned counsel for the respondents submitted that the pleadings are required to be sufficient enough to convey the defendant what are the allegations against him so that he may rebut the allegations of the plaintiff. On the basis of the pleadings, issues were framed, which also makes the case clear of one party to another party. The issues for which burden to prove is placed upon the plaintiffs makes the defendant aware about the controversy. In this case the issues are clearly understood by both the parties and both the parties led their evidence and cross-examined each other and other witnesses thoroughly on all the grounds for eviction of tenant which are the grounds for eviction of tenant under the Act of 1950. No plea of lack of pleading or non-framing of the issue by the trial court can be entertained in second appeal. In this case, the plaintiff pleaded that the suit shop has been sub-let by the plaintiff to the sub-lettees. The plaintiff filed the suit for eviction on this ground knowing it well that in case tenant sub-let the

suit property without permission of the landlord, the landlord is entitled to decree under sub-clause (e) of sub-section (1) of Section 13 of the Act of 1950. The defendant also contested the suit knowing it well that the plaintiff filed the suit for eviction of the defendant on the ground of sub-letting. The defendant cannot be heard to say that he was not knowing the law, particularly sub-clause (e) of sub-section (1) of Section 13 of the Act of 1950. It is also submitted that the contention of the learned counsel for appellant that sub-clause (j) of clause (B) of Section 108 of the Transfer of Property Act allows creation of said lease and sub-letting clearly demonstrates that the tenant wants to submit that he was fully aware of the law so far as sub-clause (j) of clause (B) of Section 108 of the Transfer of Property Act is concerned, which gave the lease right to sub-let but he could not understand from pleading which sub-letting is not permissible despite the fact that it is not the case of the defendant that he, if sub-let the suit premises, he did so as he has right to do so by virtue of Section 108(B)(j) of the Transfer of Property Act.

It is also submitted that the trial court framed issue specifically after hearing the defendant-tenant about allegation of sub-letting. The trial court specifically framed issue no.3 to the effect that whether defendant no.1 to 8 sub-let part of the suit premises to defendant no.3 on rent of Rs.150/- per month “without the consent of the landlord”.

The defendant led evidence on this issue as well as cross-examined the plaintiff on this issue, therefore, the defendant cannot raise objection about lack of pleading. It is also submitted that according to plaintiff-respondent, it is not case of even lack of pleading and once a suit is filed stating therein that the plaintiff is seeking decree on the ground of sub-letting and that ground is under sub-section (e) of sub-section (1) of Section 13 of the Act of 1950, it cannot be read bereft of sub-clause (e) of sub-section (1) of Section 13 of the Act of 1950 and cannot be read along with only sub-clause (j) of clause (B) of Section 108 of the Transfer of Property Act.

Learned counsel for the respondent further submitted that so far as evidence is concerned, the first appellate court has considered each and every piece of evidence including the documentary evidence and thereafter recorded the finding of fact. It is also submitted that the first appellate court since has decided the question of fact on the basis of the evidence and according to the learned counsel for the respondents, this Court cannot and should not interfere in such finding of fact. It is also submitted that Hon'ble Apex Court in number of cases held that even erroneous finding of fact cannot be interfered unless it is vitiated for the reasons enumerated in the judgments of the Hon'ble Apex Court. It is not a case of non-consideration of any evidence, oral or documentary. Therefore, the finding of fact is binding.

It is also submitted that even from the record it is proved that the plaintiff's sign-board is clearly visible in the photograph over which the sub-lettee's sign-board is also clearly visible. The photograph is taken in a small town where more advance cameras were not available and it appears that if photograph of entire building would have been taken, it might not have given clear picture of the sign-boards of the plaintiff and his sub-lettee. The plaintiff produced photographs and the negatives of the photographs. The plaintiff stated on oath that these photographs are of the property in dispute and were taken by the photographer. There may be contradictions in timings and the manner in which the photographs were taken but still the photographs remain as it is. It is immaterial when these photographs were taken. The photographs were proved by the person who took the photographs and who took the photographs at the instance of the plaintiff. There is no dispute about admissibility of the evidence. So far as confrontation of these documents with the defendant is concerned, it is true that the counsel conducting the case on behalf of the plaintiff has not put any specific question after showing the photographs to the defendant but that technicality of law also cannot come in the way of the plaintiff because the photos are the documents which were taken by third person and in that process, defendants were not involved. The photos were admitted in evidence and became part of the record and evidence, therefore,

even if defendants were not confronted with photos, still the photos are evidence and if evidence is trustworthy, it can be relied upon. DW-1, in his cross-examination at page 5 stated that he never saw the board "Hind Tailor" on the shop in dispute twice, still he did not state that photographs which has been admitted and became part of the evidence are not photographs taken of the building in dispute by pointing out that Exs.35, 36, 37 and 38 are not photographs of his shop.

It is also submitted that there is oral evidence in support of the plea of sub-letting which were considered by the first appellate court in detail whereas the trial court proceeded on presumption only. The critical analysis of the evidence is to find out the truth and not to discard the evidence which is having element of truth in it.

The learned counsel for the respondents also submitted that the learned counsel for the appellants tried to read all the evidence documentary as well as oral only for the purpose of its re-appreciation by this Court in second appeal and it is not a case where any of the evidence has not been considered by the first appellate court or has been mis-read by the first appellate court for reversing the judgment of the trial court.

The learned counsel for the respondents vehemently submitted that the material alteration depends upon the facts of each case. In case where a big hall is let out, a temporary structure is put like cabin

or a temporary wall, it may not amount to material alteration. But when frontage is changed in a manner so as to cover the veranda and has been converted into shop(in this case) and that can be used independently, it changed the frontal structure of the building. The tenant in this case by putting shutters after closing the veranda and converting front veranda in closed shop, amounts to material alteration in the suit premises. The tenant has right to enjoy the property as given. He takes the property on rent knowing it well that what are the structures which he shall occupy during tenancy period and he is prevented by law from changing the property of the landlord who is owner of the property and the tenancy right is the right to use and enjoy the property and not to convert the property. Therefore, the first appellate court was right in holding that it is a case of material alteration looking to the facts of the case. The contention of the learned counsel for the appellants that change of temporary roof by another temporary roof or certain other changes cannot be considered material alteration, cannot be applied in the present case.

I considered the submissions of the learned counsel for the parties and perused the record also.

Much has been said by the learned counsel for the appellant about lack of pleading with the help of several judgments referred above, but the argument of the learned counsel for the appellants about

lack of pleading deserves to be rejected summarily because of the simple reason that the defendant contested the suit knowing it well that he is facing the allegation of sub-letting and he submitted the written statement contesting the allegation of the plaintiff about sub-letting and, thereafter, the trial court framed the issue specifically that whether defendant sub-let the rented premises “without permission of the landlord” making it clear what are the allegations against the defendant. The defendant thoroughly cross-examined the plaintiff and his witnesses on this issue.

Otherwise also, the right to sub-let the property is given by Section 108(B)(j) T.P. Act, 18882 but the restriction has been put by the Rent Control Act over lessee's right to sub-let and a prior permission of landlord for creating sub-lessee has been made essential and violation of which makes the tenant liable for eviction from the leased premises. The appellant's hyper-technical objection about lack of pleading is based on his knowledge of law (Section 108(B)(j) of the Transfer of Property Act) along with his claim of ignorance of law as enacted in the Rajasthan by enacting Rajasthan Premises (Control of Rent and Eviction) act, 1950 because of the reason that according to defendants they know that the lessee has right to sub-let as per Section 108(B)(j) of the Transfer of Property Act, 1982 but prior permission of landlord for creating sub-lease is essential was not in their knowledge and the

defendants could understand the meaning of allegation of sub-letting with reference to Section 108(B)(j) of T.P. Act and could not understand allegation of sub-letting with reference to clause (e) of sub-section (1) of Section 13 of the Act of 1950. Such fine ingenious legal technical plea may demonstrate good legal skill of expert in legal profession but in this case it is too late. If objection about lack of pleading is accepted at latter stage of suit or at first appellate stage then that will be benefit to those persons who by their conduct have clearly shown that they understood the allegations against them, contested it and they failed in trial court and thereafter they with the help of law expert (or even by their own study of law) came to know that the pleas which they understood and contested, in fact, were not understood by them.

Even if it is choice of the defendant to contest the suit on question of fact or on question of law or on both, question of law and question of fact then the legal plea dependent upon fact cannot be allowed to be raised when not raised in time. This principle is required to be followed with more rigour when not taking of such objection in time deprives other party from correcting pleadings, if permissible by law. The allegation of sub-letting against tenant with claim of decree of eviction of tenant by all its implication is an allegation of landlord that the premises has been sub-let by the tenant without permission of the landlord and cannot be read to mean that the premises has been let-out

with the consent of the landlord expressly or impliedly still the landlord is seeking eviction of the tenant on the ground of sub-letting. This Court has no hesitation in holding that in the suit claiming relief of eviction of tenant on the allegation of sub-letting by the tenant without specific mention of the words “without consent of landlord”, the plea of “without permission of the landlord” is inherent in it, because of the plain and simple reason that which sub-letting is ground for eviction is given in the Rajasthan Premises (Control of Rent and Eviction) Act,1950. Some of the facts are inherent, if plea is read with reference to law applicable.

As plaint must clearly convey the case of the plaintiff to the defendant, the defence of the defendant must be clear so that the plaintiff can meet with the defence of the defendant and may also correct formal defects in the suit or may amend the suit or may submit additional pleadings whichever may be required and can be done to meet the defence/allegation of the defendant. Law of pleading is applicable to both the plaintiff and defendant with no difference. Pleading of each other should make each other aware of each other's case, allegations, ground and relief’s so that no one can give surprise to other and win by tricky skill or take advantage of his own lapse.

At this stage, it will be worthwhile to refer the judgment of the Hon'ble Apex Court delivered in the case of Duggi Veera Venkata Gopalla

Satyanarayana vs. Sakala Veera Raghavaih and an. (1987(1) RCR 186, relied upon by the learned counsel for the appellants. Hon'ble the Apex Court in the said judgment held that in a petition for ejectment on the ground of *bona fide* requirement, all the ingredients in relevant section of Rent Act must be pleaded and proved and proof offered without appropriate pleading is of no relevance. The learned counsel for the appellants referred that part of the judgment of the Hon'ble Supreme Court in support of his plea for dismissal of the suit on the ground of lack of pleading ignoring the facts of the above case as well as the *ratio descendi* in the judgment of Duggi Veera Venkata Gopalla Satyanarayana (supra). In that case itself, the objection about lack of pleading was not taken in any of the courts below, as is the case in hand. Hon'ble the Apex Court specifically, in that case, did not permit the appellant to raise the plea of lack of pleading because the fact was not raised at any stage of the proceedings before the courts below. Hon'ble the Apex Court in the above said judgment, further held that even if the eviction order is set aside and the matter is remanded back to the Rent Controller allowing the parties to amend the pleadings and to adduce further evidence, it will be a futile exercise inasmuch as all the materials are already on record. In the same way, in this case also the objection was not taken in written statement or when issue was framed or there after during entire trial and further, not even in memo of

appeal before first appellate court. Therefore, following the judgment of the Supreme Court, the objection sought to be raised by the appellant deserves to be rejected. Not only above but the objection about lack of pleading is based on abstract principle of law only which has no application in the facts of present case. The objection, as stated above is that the plaintiff has not specifically mentioned the words "without permission of the landlord" along with the words sub-letting in the plaint (and that was not held to be defect in pleading by this Court in preceding para looking to the facts of this case). Further it will be worthwhile to mention here that it is not the case of defendant-tenant that he sub-let the suit property because he had right to sub-let is by virtue of Section 108(B)(j) of the Transfer of Property Act nor it is the case of the defendant-tenant that he sub-let the suit premises with the consent of the landlord. Therefore, there is no need for the plaintiff to amend the suit to add some words in the plaint to make obvious (obvious to defendant only) what he meant by sub-letting. It will be worthwhile to recapitulate that the defendant-tenant appellant seriously contested the issue of fact of sub-letting that he did not sub-let the suit premises. In view of the above also, the suit of the plaintiff cannot be dismissed on the ground of lack of pleading on any of the grounds submitted by the learned counsel for the appellant.

Another judgment relied upon by the learned counsel for the

appellants was delivered by the Hon'ble Apex Court in the case of Hasmat Rai and another vs.Raghunath Prasad (AIR 1981 SC 1771). Hon'ble the Court, in that case, in para 10 held that :-

> "**Ordinarily,** therefore, when a landlord seeks eviction under S.12(1)(f) the Court after satisfying itself that there are proper pleadings must frame two issues namely (i) whether the plaintiff landlord proves that he bona fide requires possession of a building let to the tenant for non-residential purpose for continuing or starting his business and (ii) whether he proves that he has no other reasonably suitable non-residential accommodation of his own in the city or town concerned." (Emphasis supplied)

Thereafter, Hon'ble the Apex Court observed that :-

> "Without elaborating we must notice a well established proposition that any amount of proof offered without pleading is generally of no relevance."

In that case, Hon'ble the Apex Court found that the pleading was cryptic. Hon'ble the Apex Court held that "on issue framed on the basis of cryptic pleading, the trial court's finding is also cryptic." Because of the above reasons, the Hon'ble Apex Court looked into the pleadings and defence taken by the defendant as well as the reasons given by the High Court in High Court's judgment. In above judgment, the Hon'ble the Apex found that "when the High Court was faced with a dilemma whether the landlord required the whole of the building including

demised premises now in possession of the appellant tenant for starting his business of Chemists and Druggists and when the High Court had before it an indisputable fact that the respondent landlord has obtained vacant possession of a major portion of the building which was in possession of firm M/s. Goraldas Parmanand, was it necessary for him to have any additional accommodation?". Hon'ble the Supreme Court found that reason given by the High Court for maintaining eviction order passed by the courts below on assumption that the landlord needs accommodation for his residence also but there was no such plea in the plaint. Therefore, it is not a case of decreeing the suit of the plaintiff on the ground which is not born out from the pleadings. It will be further worthwhile to mention here that in the case of Hasmat Raj (supra) also, after noticing the pleadings, the Hon'ble Apex Court only permitted the defendant to amend the written statement and allowed the parties to lead evidence. Said judgment has no application to the facts of the case for the proposition as advanced by the learned counsel for the appellant.

Another brief but binding judgment of the Hon'ble Supreme Court relied upon by the learned counsel for the appellant is delivered in the case of Shri H.D. Vashishta v. M/s Glaxo Laboratories (L) (P) Ltd. (AIR 1979 SC 134). In this case, Hon'ble the Apex Court held that material facts constituting cause of action, nor averred in the plaint is fatal.

There cannot be any dispute for the legal proposition but as held above, in present case pleading is sufficient and clear, therefore, the judgment has no application to present case.

The learned counsel for the appellants also relied upon the Division Bench judgment of the Madhya Pradesh High Court delivered in the case of Durga Prasad vs. Mst. Parveen and others (AIR 1975 M.P. 196), and the judgments of the Hon'ble Supreme Court delivered in the cases of Harkirat Singh vs. Amarinder Singh (2006 AIR SCW 4), Udhav Singh vs. Madhav Rao Scindia (AIR 1976 SC 744) and Rajgopal (Dead) by L.Rs. v. Kishan Gopal and another (2003 AIR SCW 4986) and the judgments of this Court delivered in the cases of Girdhar Singh and another vs. Anand Singh & ors. (AIR 1982 Raj. 229), Rajendra Kumar vs. Jamna Das (1975 R.C.J. 304) and Phool Chand and another vs. Dr. Gulab Chand (1999(3) WLC (Raj.) 189). Principally in all judgments referred above, it has been laid down and reiterated again and again that all the ingredients which constitutes cause of action for seeking eviction of the tenant under the provisions of the Rent Control Act, must be pleaded specifically.

All the judgments relied upon by the learned counsel for the appellants cannot help to the appellants in view of several reasons like (1) not objecting to the lack of pleading by the defendant in time, (2) the specific issue has been framed by the trial court incorporating the

actual ground of eviction with the phraseology which according to the defendant should have been in the plaint, (3) defendant got full opportunity to contest the allegation of sub-letting during trial and he availed it, (4) no prejudice has been caused to the defendant because not mentioning of exact phraseology as given in the section, (5) defect, if it was there, it was curable by amending the plaint, (6) if there was defect in pleading, the plaintiff could not cure the defect because the defendant by not raising objection in time and by contesting the issue of sub-letting as issue of fact only persuaded the plaintiff to believe that defendant understood that on proving fact as pleaded, of giving premises on rent to third person by the tenant, the plaintiff will be entitled to decree and (7) the ground was not raised before first appellate court. Above all is the fact that in present case, the pleading was not defective at all. Therefore, the judgment relied upon by the learned counsel for the appellants have no application to the facts of this case.

It is also vehemently submitted by the learned counsel for the appellants that the plaintiff failed to prove parting with possession of the premises by the appellant-tenant. According to learned counsel for the appellant, unless the exclusive possession is given to the alleged sub-lettee and the tenant looses his factual and legal possession over the property, the sub-letting is not proved. The argument advanced by

the learned counsel for the appellants deserves to be rejected only on the ground that the said finding of fact has been recorded by the first appellate court after appreciation of all oral and documentary evidence.

It will be appropriate to consider the judgments relied upon by the learned counsel for the appellants on this point also. The learned counsel for the appellants relied upon the following judgments: (1) M/s Delhi Stationers and Printers v. Rajendra Kumar (AIR 1990 SC 1208), (2) Deepak Bajerji v. Leelavati (AIR 1987 SC 2055), (3) Jagdish Prasad vs. Smt. Angoori Devi (AIR 1984 SC 1447), (4) Jagan Nath (Deceased) through Lrs v. Chander Bhan and others (AIR 1988 SC 1362), (5) M/s Shalimar Tar Producers Ltd.v. H.C. Sharma and others (AIR 1988 SC 145), (6) United Bank of India vs. Cooks & Kelvey Properties Pvt. Ltd. (AIR 1995 SC 380), (7) Kala and another v. Madho Prasad Vaidya (AIR 1998 SC 2773), (8) Bhomle Ram v. Mahesh Chandra and another (1996 DNJ (Raj.) 480), (9) Amir Ahmed v. Yusuf (1985(1) WLN 550), (10) Dev Kumar (Died) through Lrs. v. Smt. Swaran Lata and other s(AIR 1996 SC 510) and Resham Singh v. Raghbir Singh and another (1999 AIR SCW 3029).

I need not to deal in detail with all above judgments in view of the fact that the proposition of law which has been laid down in various judgments referred above, is not in dispute, as the law almost is settled on the point how the sub-lease is created. By the sub-lease, the sub-

lessee gets the tenancy right and exclusive possession with right to exclude all. If the sub-lease is lawfully created, the sub-lessee gets the right to exclude tenant in chief also. The parting with possession by the tenant in chief is one of the essential ingredients of sub-letting. At this juncture, it will be relevant to mention here that in the Rajasthan, by the Act of 1950, mere parting with possession of the premises by the tenant in chief, without creation of sub-lease is also ground for eviction of the tenant. However, presently we are concerned with the allegation of sub-letting. It is also settled law that initial burden lies upon the plaintiff to prove that the tenant has sub-let the suit property and handed over exclusive possession of the premises or part of the premises to the sub-lessee for consideration with right to possess exclusively. The learned counsel for the appellants tried to read all the evidence before this Court in second appeal to demonstrate that the conclusion drawn by the first appellate court from the evidence is wrong. The learned counsel for the appellants tried to convince this Court that this Court should re-appreciate the evidence, oral as well as documentary including photographs. Appreciation and re-appreciation of the evidence already considered by the first appellate court, is beyond the jurisdiction of the High Court under Section 100, C.P.C.. Hon'ble the Apex Court already held that error of fact and even error of law cannot be corrected by the High Court while exercising power under Section

100,C.P.C. This is not the case of the appellants that the first appellate court has not considered the oral and documentary evidence produced by the parties while deciding issue of sub-letting or issue of material alteration in the suit premises. Therefore, I do no find any reason to allow the appellants to re-agitate the issues already decided by the first appellate court which are essentially the issue of facts.

The learned counsel for the appellants referred photographs Ex.35 to Ex.38 and submitted that these documents are not trustworthy evidence. Firstly, the argument advanced by the learned counsel for the appellants is for re-appreciation of the evidence which is not permissible under jurisdiction under Section 100 C.P.C. Secondly, the documents were proved by the plaintiff by his evidence and by producing photographer. There may be some inconsistencies or minor contradictions in the evidence of the plaintiff and his witness but those contradictions were also considered by the first appellate court. This Court also perused the photographs and it is clear from the photographs that over the sign-board of the plaintiff, there is board of sub-lettee. Since the photo was taken from distance so that the entire building with both the sign-boards may come in the photo, therefore, it is not clear as could have been taken by more skilled photographer, therefore, it has been condemned by the appellants by saying that photos are not clear. This Court is not convinced from the argument advanced by the learned

counsel for the appellants. It will be worthwhile to mention here that the learned counsel for the appellants himself has shown other photograph of the entire disputed premises, for which the learned for the respondent raised objection. Be it as it may be, after going through that photograph also, this Court is convinced that photograph produced by the plaintiff containing both the sign-boards was of the building in dispute. Otherwise also, the courts below considered oral evidence also in support of the documentary evidence apart from the evidence of the plaintiff and his photographs and held that the suit property has been sub-let by the original tenant. The defendant even did not produce the alleged sub-lettee despite the fact that he stated that the alleged sub-lettee's brother was working with the defendant-tenant. Therefore, it cannot be said that the case of sub-letting has been decided by the first appellate court without proper appreciation of evidence or there is reason to take a different view by this Court.

The learned counsel for the appellants also relied upon the judgment of this Court delivered in the case of Mishri Bai v. Krishna Lal Chaddha (1997 DNJ (Raj.) 714) and the judgment of the Hon'ble Apex Court delivered in the cases of Rajinder Prashad(dead) by L.Rs. vs.Smt. Darshana Devi (AIR 2001 SCW 3042) and Sarwan Singh vs. State of Punjab (2002 AIR SCW 4295) as well as the judgment of the Calcutta High Court delivered in the case of A.E.G. Carapiet vs. A.Y. Derderian

(AIR 1961 Cal. 359) in support of his plea that the appellant has not been confronted with the photographs Ex.36, Ex.37 and Ex.38, therefore, the said documents cannot be used against the appellant. It has been held by the Calcutta High Court in the case of A.E.G. Carapied (supra) that the party should put his case in cross-examination to witnesses of opposite party and that is rule of essential justice and not merely technical one. The Hon'ble Supreme Court also in the case of Rajindra Prasad's case (supra) held that statement of postman that tenant refused to accept the demand notice, cannot be discredited because of the reason that the postman was not cross-examined on this crucial aspect and no suggestion was put to him whether he was on duty during the said period and endorsement “refused” on envelop was incorrect. In the case of Mishri Bai (supra), when the defendant did not cross-examine the plaintiff on the statement of the plaintiff about non-user of the shop by the tenant for six months for any reasonable cause, this Court held that the defendant by that admitted the allegation of non-user of the shop.

The plaintiff's case about sub-letting was pleaded and thereafter the plaintiff gave his own statement and produced his witness in support of plaintiff's said plea. The defendant thoroughly and at length, cross-examined the plaintiff and his witnesses, is apparent from the record itself. The photographs were also produced by the plaintiff and proved

by plaintiff's witness. On photographs also, the defendant thoroughly cross-examined the plaintiff and his witnesses. The document, when tendered in evidence and proved by party and contesting party is given opportunity to cross examine the witnesses relating to the documents then it cannot be said that the document was not brought to the notice of opposite party. Because tendering in evidence of document in presence of the counsel for the rival party, is not mere production of document before the learned counsel of the opposite party but it is production of the said documentary evidence before the party himself. By cross-examination, the contesting party himself takes notice of the document produced in evidence by his rival. By not cross-examining, the party may show his willingness to admit the document or the fact stated with respect to the document. The confrontation with the document is more relevant when the document sought to be used against the author of the document or against the person who is directly involved in the preparation of the document. For example, if there is writing of a defendant and plaintiff wants to use said document against the defendant then the defendant is required to be confronted with the said writing. The converse is also true and if the defendant wants to use the writing of the plaintiff against the plaintiff, then he should confront the document. A document may be useful piece of evidence independently, without there being any involvement of the rival party in preparation of

the document. For example, a deed executed by one person in favour of another person and relevant for the purpose of showing some facts mentioned in the said deed in support of the case of the plaintiff or defendant, as the case may be, and/or to destroy the case of the plaintiff or defendant, as the case may be, then in that situation, the document does not loose its evidentiary value if proved in accordance with law merely on the ground that the said document, though tendered in evidence and oral evidence has been produced to prove the document and opportunity to cross-examine has been given to the rival party, but no specific question has been put to the said contesting party about the document when he entered into the witness-box. With production of the document in evidence and after it is admitted in evidence and when said document is proved that document becomes legal evidence. It may be desirable that the parties should be confronted with the documents which are sought to be used against contesting party, but if not confronted, that evidence (document) do not loose its value as of evidence. In such circumstance, at the most, the documents may be considered with caution and it may be seen that in fact no prejudice has caused to the contesting party because of non-confrontation of the document. The conduct of the contesting party is also relevant. By cross-examination on documentary evidence, the rival party takes a chance to discredit the evidence. He cannot thereafter say that he had

knowledge of the all other evidence except said documentary evidence for which he (through his counsel) cross-examined the concerned witnesses. Said party cannot choose and pick up the evidence of other party for rebuttal. It is relevant to mention here, as held in various judgments, including the judgment of this Court delivered in the case of Mishri Bai (supra), when on statement, the rival party does not cross-examine, the said fact can be treated to be admitted by the rival party and in the same manner, when the document is produced and the party cross-examined on document, against whom the document is sought to be used, did not rebut and utter a single word about the credibility of the said document, then that fact may be relevant for the purpose of deciding the value of the evidence in favour of the party who produced the documentary evidence.

In this case, the documents were produced by the plaintiff in evidence and the documents are photographs. They were taken by the photographer. The photographer appeared in the witness-box and proved the photographs. The original negatives are also placed on record. All above evidence was in the knowledge of the defendant and the defendant, for the reasons best known to him, did not voluntarily state any word about the photographs or the negatives. It is too late to say that the photography may be result of trick photography, particularly when it was not the case of the defendant while cross-

examining the plaintiff or photographer.

The plaintiff, therefore, proved the case of the sub-letting with the help of documentary evidence as well as the oral evidence, as held by the first appellate court.

No substantial question of law is involved in this appeal despite the fact that the learned counsel for the appellant relied upon several judgments of this Court and of the Hon'ble Apex Court in support of various pleas which already have settled the legal issues and there is no dispute about those legal propositions.

Hence the appeal of the appellants is liable to be dismissed, hence, dismissed.

However, looking to the facts of the case, it will be appropriate that the appellants may be permitted to occupy the premises upto 31.5.2007 on furnishing a written undertaking before the trial court within a period of two month from today that they shall handover the vacant possession of the suit premises to the landlord by or before 31.5.2007 and shall not part with the possession or sub-let the suit premises during this period and shall pay all the arrears of rent and decretal amount, if due, within a period of two months from today before the trial court or directly to the landlord, the decree under challenge shall not be executed till 1.6.2007. The appellants shall also deposit the rent month by month by 15th day of each succeeding month

of their tenancy in the trial court. In case of non-compliance of the order or default in payment of rent mentioned above, the decree shall become executable forthwith.

(**PRAKASH TATIA),J.**

mlt.